IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JOSEPH K. ROBBINS,	)	**Supreme Court #84875**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article 5, section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 1994.

STATEMENT OF FACTS

Background and Disciplinary History

Respondent Joseph Robbins graduated from law school at St. Louis University in 1985. **T.** 88. At the time of hearing before the disciplinary hearing panel in August of 2002, Respondent had his own firm with one other lawyer on his staff. **T.** 89. Respondent practices in the Downtown West area of St. Louis. **T.** 88-89.

On May 30, 1995, Respondent received an admonition for violation of Rules 4-1.3, 4-1.4, and 4-8.1. **Ex.** 4; **T.** 14. On July 21, 2000, Respondent received an admonition for violation of Rules 4-1.3 and 4-1.4. **Ex.** 5; **T.** 14.

Viermann Complaint

Respondent represented Lola Viermann in a case for personal injuries she suffered in an accident. **T.** 17. Respondent also represented Walter Viermann, Lola's husband, in his claim for workers' compensation. **T.** 17. Lola Viermann died May 15, 1995. **Ex.** E. Mrs. Viermann's personal injury case settled on June 20, 1995. **Ex.** C; **T.** 38-39. When Mr. Viermann went to Respondent's office to finalize his deceased wife's personal injury settlement, he also hired Respondent to pursue a medical malpractice wrongful death case as a consequence of his wife's death. The Viermanns believed Mrs. Viermann's doctor had not treated her cancer appropriately. **T.** 17-20, 111. At the time Respondent met with Mr. Viermann regarding settlement of Mrs. Viermann's personal injury case, he

withheld $1,000 from Mr. Viermann's portion of the settlement to cover anticipated expenses in the wrongful death case. **T.** 20-21.

Respondent was representing Mr. Viermann on his workers' compensation case at the same time he was supposed to be pursuing the wrongful death case. **T.** 38. Mr. Viermann began calling Respondent's office about six months after meeting with Respondent in June of 1995 to check the status of both his workers' compensation case and the wrongful death case. **T.** 23, 44. Mr. Viermann called Respondent's office about half a dozen times. **T.** 24, 44. Mr. Viermann was never allowed to talk to Respondent when he called the office, although he did talk to Respondent's associate. **T.** 22, 33, 46. Mr. Viermann was never told the wrongful death case had never been filed. **T.** 30. Mr. Viermann was told several times over the years that there was still time to file the wrongful death case. **T.** 42.

Respondent or someone in his office sent twenty-one letters between June of 1995 and January of 1998 to healthcare providers seeking information about Mrs. Viermann's medical records. **Ex.** F. Respondent never advised Mr. Viermann that he had concluded that Mr. Viermann did not have a good wrongful death case. **T.** 45, 53. Respondent never decided not to pursue the wrongful death case. **T.** 113.

There is a three year statute of limitations on a wrongful death cause of action. The statute of limitations extinguished Mr. Viermann's cause of action for the wrongful death of Mrs. Viermann in May of 1998. **T.** 91. Respondent never discussed the statute of limitations with Mr. Viermann. **T.** 21-22. The wrongful death case was never filed.

T. 52, 93. Respondent does not remember much about the case or why he allowed the statute of limitations to run on the wrongful death cause of action. **T.** 107.

Respondent settled Mr. Viermann's workers' compensation case in June of 1999. **Ex.** B. Mr. Viermann signed the settlement statement for the workers' compensation case on July 12, 1999. **Ex.** A. Respondent does not recall whether he realized at the time he met with Mr. Viermann in July of 1999 that the statute of limitations had already run on the wrongful death cause of action. **T.** 92. Respondent and Mr. Viermann did not discuss the wrongful death file when the workers' compensation case settled. **T.** 92.

Mr. Viermann decided he wanted the wrongful death file back several months after his workers' compensation case settled. **T.** 37. Mr. Viermann went to Respondent's office to pick up the wrongful death file. **T.** 43. Respondent was upset that Mr. Viermann was picking up the file. **T.** 44. Respondent returned $863.80 of the $1,000 he had withheld from the earlier settlement to cover expenses (obtaining copies of medical records) in the wrongful death case. **Ex.** D; **T.** 40-41, 95. Some staff person in Respondent's office told Mr. Viermann that he still had time to file the wrongful death case. **T.** 42. No one in Respondent's office warned Mr. Viermann about the statute of limitations when he picked up the file, **T.** 31, much less told Mr. Viermann that the statute of limitations had already run on the case. **T.** 48.

Mr. Viermann found out that the statute of limitations had run by subsequently taking the file to another lawyer. **T.** 32. Mr. Viermann never received any money as a consequence of his claim for the wrongful death of his wife and has not pursued a claim

for malpractice against Respondent. **T.** 32, 124. Mr. Viermann wrote a complaint letter against Respondent in August of 1999. **Ex.** 7.

McFadden Complaint

In March of 1994, Betty McFadden of St. Louis, Missouri, had a prescription for 50mg of mysoline filled at a Walgreens. **T.** 62-63. The pharmacist mistakenly gave Ms. McFadden 250mg of mysoline. Four or five days after she began taking the medicine, Ms. McFadden developed ulcers in her mouth and suffered other adverse physical ailments necessitating a trip to the emergency room and numerous trips to her doctor's office. **T.** 63-64.

Ms. McFadden hired Respondent on June 27, 1994, to represent her in her claim against the pharmacist and the drugstore. **T.** 62, 64. Respondent had handled other prescription cases against Walgreens. **T.** 133. Ms. McFadden understood from her initial meeting with Respondent that he would eventually file suit. Respondent said nothing to Ms. McFadden about the statute of limitations applicable to her case. **T.** 66.

Ms. McFadden thereafter called Respondent's office every month or so to check on her case. She was never successful in getting to talk to Respondent, although he did sometimes return her calls. **T.** 69-70.

There is a two year statute of limitations on claims like the one Ms. McFadden brought to Respondent. **T.** 96. The statute of limitations on Ms. McFadden's claim ran on March 26, 1996. Respondent filed Ms. McFadden's case on March 29, 1996. **T.** 96. Respondent filed Ms. McFadden's case after the statute of limitations had run. **T.** 101.

In January of 1997, Respondent sent Ms. McFadden some interrogatories propounded on her by the pharmacy. **T.** 67-68. Ms. McFadden assumed from getting the interrogatories that the case had been filed. **T.** 71. Respondent never sent her a copy of the petition. **T.** 77.

On February 3, 1997, the defendants filed a motion to dismiss Ms. McFadden's petition because it was barred by the running of the two year statute of limitations. **Ex.** 10 (Motion of defendant Walgreens to Dismiss Plaintiff's First Amended Petition). On March 27, 1997, Respondent moved to dismiss Ms. McFadden's petition without prejudice because he did not want the court to grant the motion to dismiss. **T.** 121. Respondent acknowledged that the savings statute provides no relief to a time-barred cause of action. **T.** 107. The Court dismissed the petition on April 1, 1997. **Ex.** 10 (Memorandum to Clerk). Respondent was very concerned about the statute of limitations. **T.** 121. Respondent never told Ms. McFadden that he had dismissed her case, and she never authorized him to do so. **T.** 78-79, 82.

In November of 2000, Ms. McFadden called Respondent because she was worried about the statute of limitations in her case. It was Ms. McFadden's anecdotal understanding that there was a seven year statute of limitations on any kind of case. **T.** 70. Respondent told Ms. McFadden she had nothing to worry about. **T.** 70.

In January of 2001, Ms. McFadden called Respondent to ask whether there had been any settlement negotiations in her case. **T.** 72. Respondent told Ms. McFadden that Walgreens had not made her any offers. **T.** 82-83. Respondent did not tell Ms. McFadden that he had dismissed her case. **T.** 83. Respondent thinks he was confusing

Ms. McFadden's case with another case. **T.** 98. Ms. McFadden assumed the case was still pending, because nothing was said about it to the contrary. **T.** 83. Respondent asked Ms. McFadden how much she would take to settle the case. She told him it would take a million dollars. **T.** 73. Respondent told Ms. McFadden that since the courts would be closed on Martin Luther King's birthday, he would have all that day to discuss her case with her. **T.** 74-75. Respondent did not call Ms. McFadden back until after Martin Luther King's birthday. **T.** 74-75. When Respondent called Ms. McFadden back, he told her that he was still working on her case. **T.** 75-76.

Ms. McFadden called Respondent's office a few more times after February of 2001, but he never returned her calls. **T.** 76-77. Ms. McFadden wrote a complaint letter against Respondent in June of 2001. **Ex.** 9. After writing the complaint letter, Ms. McFadden called the local courthouses and eventually learned that Respondent had dismissed her case. **T.** 77-78. Ms. McFadden never received any money as a consequence of her claim for the erroneously filled prescription and has never asserted a claim for malpractice against Respondent. **T.** 79, 124.

Respondent analyzed his office procedure after so many complaints had been filed against him. **T.** 99. Now he reviews a file before telling a client anything about its status. **T.** 99-100. Now Respondent builds a six month buffer into his files so he will not miss a statute of limitations. **T.** 102. Now Respondent reviews all of his open files every thirty to sixty days to check the status. **T.** 114.

Disciplinary Case

By letter dated July 2, 2001, the Division XI Disciplinary Committee advised Respondent that Ms. McFadden had filed a complaint against him. The notice was sent to Respondent's office address on Delmar in St. Louis, Missouri. **Ex.** 8. The notice was sent to the correct address. **T.** 110. Respondent does not dispute that the July 2, 2001, letter was mailed to him. He does not remember receiving it. **T.** 120.

On February 8, 2001, Division III of the Region XI Disciplinary Committee voted unanimously that probable cause existed to believe that Respondent was guilty of professional misconduct with respect to Mr. Viermann's complaint. **Ex.** 1. On August 13, 2001, Division III of the Regional XI Disciplinary Committee voted unanimously that probable cause existed to believe that Respondent was guilty of professional misconduct with regard to Ms. McFadden's complaint. **Ex.** 1. The division also voted unanimously to include a charge for Respondent's failure to respond to the committee's request for information about Ms. McFadden's complaint. **Ex.** 1.

A six-count information was served on Respondent on August 22, 2001. **Ex.** 2. Hearing before a disciplinary hearing panel was had on August 2, 2002. Informant dismissed counts II, III, IV, and V of the information during the hearing because the complaining witnesses did not appear to testify. **T.** 86. The matter was submitted to the panel on count I (Viermann complaint), alleging violations of Rules 4-1.1, 4-1.3, 4-1.4, 4-1.16(d), 4-8.4(c)(d), and count VI (McFadden complaint), alleging violations of Rules 4-1.1, 4-1.3, 4-1.4, 4-8.4(c)(d), and 4-8.1.

On August 27, 2002, the disciplinary hearing panel issued its decision, finding Respondent violated Rules 4-1.1, 4-1.3, 4-1.4, 4-1.16(d), 4-8.1(b), and 4-8.4(c)(d). The panel recommended a minimum one month suspension for each of the counts submitted and an admonition for violation of Rule 4-8.1(b). The Office of Chief Disciplinary Counsel did not concur in the recommendation, causing the record to be filed with the Court.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE DEPRIVED TWO CLIENTS OF THEIR CAUSES OF ACTION IN THAT HE ALLOWED THE STATUTES OF LIMITATION TO RUN ON THE CASES THEY ENTRUSTED TO HIM AND THEN FAILED TO ACKNOWLEDGE TO THE CLIENTS WHAT HE HAD DONE

In re Lavin, 788 S.W.2d 282 (Mo. banc 1990)

Rule 4-1.4

Rule 4-8.4

ABA/BNA Lawyers' Manual on Professional Conduct 31:401 (1997)

Restatement (Third) of the Law Governing Lawyers, §20 Comment (c) (Vol. 1 2000)

POINT RELIED ON

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR A MINIMUM OF SIX MONTHS BECAUSE RESPONDENT KNOWINGLY VIOLATED DUTIES TO HIS CLIENTS IN THAT HE CONCEALED FROM THE CLIENTS THAT THE STATUTE OF LIMITATIONS BARRED THEIR CAUSES OF ACTION AND, IN ONE CASE, THAT HE HAD DISMISSED THE CLIENT'S CASE

A.B.A. Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Frank, 885 S.W.2d 328 (Mo. banc 1994)

In re Cupples, 979 S.W.2d 932 (Mo. banc 1998)

In re Disney, 922 S.W.2d 12 (Mo. banc 1996)

Rule 4-1.3

Rule 4-1.4

Rule 4-8.1(b)

Rule 4-8.4

Rule 4-8.4(c)

Rule 4-8.4(d)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE DEPRIVED TWO CLIENTS OF THEIR CAUSES OF ACTION IN THAT HE ALLOWED THE STATUTES OF LIMITATION TO RUN ON THE CASES THEY ENTRUSTED TO HIM AND THEN FAILED TO ACKNOWLEDGE TO THE CLIENTS WHAT HE HAD DONE

Failure to file a client's lawsuit in time to avoid the running of a statute of limitations has been called a "classic form of neglect." ABA/BNA Lawyers' Manual on Professional Conduct 31:401 (1997). If all Respondent were charged with was a single instance of professional neglect, this case would not be before the Court. The record instead reveals proof beyond a preponderance of evidence that Respondent neglected the cases, then compounded his lack of diligence by not communicating with the clients even though they persistently called him requesting information, and, as the disciplinary hearing panel concluded, exacerbated the professional misconduct even further by not divulging to the clients that their claims were time-barred. And, it must be remembered that Respondent was admonished in 1995 for lack of diligence, failure to communicate, and failure to respond to disciplinary inquiry, and, admonished yet again in 2000 for lack of diligence and failure to communicate.

Respondent's neglect toward and failure to communicate with Mr. Viermann and Ms. McFadden seriously injured his clients. Neither client received any compensation for his or her legal claims, which were permanently extinguished by Respondent's lack of diligence. Neither brought a malpractice claim against Respondent. A client implicitly trusts his lawyer to protect his claim from being barred by a statute of limitations. Mr. Viermann and Ms. McFadden were expressly reassured by Respondent or staff in his office that the statutes of limitation did not pose a problem in their cases. Both clients entrusted their cases to Respondent years, literally, before the statute would run, yet Respondent violated their trust and, as a consequence, those individuals have been denied their basic right to have their wrongs considered by our system of justice. In *In re Lavin*, 788 S.W.2d 282 (Mo. banc 1990), the lawyer immediately cashed a client's retainer check, then did nothing for four months toward accomplishing the client's goal of collecting back child support or to increase future child support payments. This Court, which suspended Lavin with leave to apply for reinstatement after four months (and upon meeting additional conditions), disagreed with Mr. Lavin's contention that his neglect caused the client no permanent harm. The Court noted that the client was denied the benefit of the back child support and the possible benefit of an increase in the payment while Lavin neglected her legal work.

While the merit and value of Ms. McFadden's and Mr. Viermann's causes of action is unknown, that uncertainty should be resolved in the clients' favor, inasmuch as it was Respondent's failure to investigate and assess the cases, as well as to communicate that information to his clients, that has forever extinguished the claims. Respondent

testified at the disciplinary hearing that Mrs. Viermann's death was not causally connected to the alleged medical malpractice. **T.** 112. Yet, Respondent also admitted that he never made the conscious decision not to pursue the wrongful death case, nor did he communicate to Mr. Viermann that he had decided not to pursue the case. Under the circumstances, Respondent's inaction caused the clients much potential injury.

Ms. McFadden's case is even more egregious because Respondent did file the case (thereby evidencing his belief that the case had merit – see Rule 4-3.1), but did so three days after the cause of action had been extinguished. Although Respondent dismissed the case without prejudice, while a motion to dismiss based on the running of the statute of limitations was pending, Respondent acknowledged that the savings statute would provide no relief to an otherwise time-barred lawsuit. Respondent also acknowledged that he has handled other prescription drug cases, and even cases against the particular drugstore against which Ms. McFadden's claim arose. Respondent's experience with just the kind of case Ms. McFadden brought him demonstrates the lack of competency he exercised in her case. The injuries Ms. McFadden suffered at the hands of the allegedly negligent pharmacist have only been exacerbated by her turn to the legal profession for redress of those injuries.

But it was Respondent's concealment of what happened from his clients that poses the most serious challenge to his contention that an admonition is an appropriate sanction for his misconduct. See **T.** 122-123.

> If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer

> must disclose that to the client. For example, a lawyer who fails to file suit for a client within the limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw.

Restatement (Third) of the Law Governing Lawyers, §20 Comment (c) (Vol. 1 2000).

Respondent testified throughout the hearing that he did not remember the cases at issue and that he did not deliberately mislead the clients about the nonviability of their cases. Respondent said he spoke to the clients (on the rare occasions when he did respond to their inquires) without consulting their files to ascertain the true status of their matters and that he has since remedied his office practices in that regard. The disciplinary hearing panel did not believe Respondent. The panel found that Respondent engaged in "conduct that involves dishonesty, fraud, deceit, misrepresentation, and that is prejudicial to the administration of justice." DHP Decision at ¶ 17. Corroborating the panel's finding was Respondent's testimony that when he dismissed Ms. McFadden's petition, he was very concerned about the statute of limitation issue. It is simply not credible, and the panel did not believe, that Respondent thereafter forgot all about the case or confused it with another one, especially when Ms. McFadden called specifically questioning whether the statute of limitations was a problem in her case. Nor is it believable that it never occurred to Respondent to mention the statute of limitations when Mr. Viermann showed up at Respondent's office to claim the wrongful death file some

four years after Respondent agreed to pursue the matter for him, and only a couple of months after settling Mr. Viermann's workers' compensation case.

The panel must have believed that Respondent followed the pattern so frequently, and unethically, practiced by lawyers who find themselves in the unenviable position of having allowed the statute of limitations to run on a client's cause of action.

> To compound matters, a lawyer who has failed to take timely action on a client's case is likely to avoid contact with that client and may feel pressed to fabricate progress reports to explain how the action is proceeding. The result is neglect intertwined with misrepresentation and a failure to communicate with the client in violation of Rules 1.4 and 8.4. . . . These additional ethical violations exacerbate the problem by denying the client the opportunity to take other steps to preserve his or her rights.

ABA/BNA Lawyers' Manual on Professional Conduct 31:401 (1997).

While negligence, or inadvertence, can happen to otherwise capable and competent lawyers, it is a different matter altogether to knowingly go a step further and stop communicating with, or mislead, the client to avoid the consequences of one's misstep. That is what happened in this case.

ARGUMENT

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR A MINIMUM OF SIX MONTHS BECAUSE RESPONDENT KNOWINGLY VIOLATED DUTIES TO HIS CLIENTS IN THAT HE CONCEALED FROM THE CLIENTS THAT THE STATUTE OF LIMITATIONS BARRED THEIR CAUSES OF ACTION AND, IN ONE CASE, THAT HE HAD DISMISSED THE CLIENT'S CASE

Respondent knowingly deceived his clients, causing them serious injury. Even without taking into account the many aggravating factors present in this case, suspension is the appropriate sanction. Rule 4.62 A.B.A. Standards for Imposing Lawyer Sanctions (1991 ed.) The aggravating factors present in this case include Respondent's history of violating Rules 4-1.3, 4-1.4, and 4-8.1(b) (all likewise present in this case), his substantial experience in the practice of law (ten years when he took on Mr. Viermann's case and nine years when Ms. McFadden hired him), his failure to comply with a request for information from the Disciplinary Committee (also the subject of a prior admonition), and his indifference to making restitution.

A number of this Court's disciplinary decisions likewise support imposition of a suspension. In *In re Frank*, 885 S.W.2d 328 (Mo. banc 1994), the lawyer was charged

with violating Rules 4-1.1, 4-1.3, 4-1.4, and 4-8.1. While the case involved twelve different counts of the lawyer's failure to communicate with his clients and pursue their matters diligently, and a consistent failure to cooperate with disciplinary authorities, *In re Frank* lacked a finding, present in this case, that the lawyer violated Rule 4-8.4 (knowing or intentional misconduct). The record in the case at bar includes a finding that Respondent engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation, and that was prejudicial to the administration of justice. And, as was the case with Mr. Frank, Respondent has twice before been subject to sanctions for misconduct.

Dishonest and deceitful conduct resulted in suspensions for the lawyers in *In re Cupples*, 979 S.W.2d 932 (Mo. banc 1998), *In re Disney*, 922 S.W.2d 12 (Mo. banc 1996), and *In re VerDught*, 825 S.W.2d 847 (Mo. banc 1992). The lawyer in *Cupples* was found to have secretly maintained a separate law practice while ostensibly engaging in a full time practice with a firm, in violation of Rule 4-8.4(c). Only one year previously, Cupples had been reprimanded for, inter alia, a Rule 4-8.4(c) violation.

Mr. Disney was also suspended on the sole weight of a Rule 4-8.4(c) violation. The Court found that the lawyer practiced subterfuge, was not trustworthy, and failed to keep promises, all traits that run counter to an attorney's fitness to practice law.

Mr. VerDught was suspended for eliciting testimony from his client that called for answers he knew were false, even though not material, to the client's SSI case. The Court concluded the lawyer violated Rules 4-3.3(a)(4) and 4-8.4(c) and (d).

Neither Mr. Viermann nor Ms. McFadden found out from Respondent that the statutes of limitation had run on the lawsuits they had entrusted to his care. Both clients

had to find out that unfortunate information from outside sources. Admonitions failed to protect the public from Respondent's misconduct. Respondent's misconduct has now escalated to a conscious mental state necessitating a suspension.

CONCLUSION

Respondent Robbins has committed professional misconduct by violating Rules 4-1.1, 4-1.3, 4-1.4, 4-8.1(b), and 4-8.4(c)(d). Respondent's prior admonitions for violating three of these very same rules, coupled with his knowing concealment of his misconduct from his clients, require his suspension from the practice of law with no leave to apply for reinstatement for a minimum of six months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of November, 2002, two copies of Informant's Brief have been sent via First Class mail to:

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Sharon K. Weedin

CERTIFICATION: SPECIAL RULE NO. 1(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Special Rule No. 1(b);

3. Contains 4,355 words, according to Microsoft Word 97, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

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Sharon K. Weedin